**PP**

**v.**

**TAN CHEE SENG & ORS**

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CRIMINAL TRIAL NOS: 45-15-2000 & 45-7-2002]
21 AUGUST 2003

***CRIMINAL PROCEDURE:*** *Sentence - Culpable homicide not amounting to murder - Plea of guilty - Plea of guilty in face of weak evidence against offence - Whether a strong mitigating factor - Adolescent - Lesser degree of culpability - Whether deserving lighter sentence - Penal Code ss. 302, 304(a)*

This case was centred on the issue of what was the most appropriate sentence to be passed on the three accused herein, aged 19, 16 and 29 respectively, following their plea of guilty on a charge under s. 304(a) Penal Code for causing the death of one R. Selvam a/l Raman ('the deceased'), in circumstances where: (i) the attack which caused bodily injuries on the deceased was perpetrated by the 1st and 3rd accused and not the 2nd accused; (ii) the cause of death was ascertained to be septicaemia, and not the bodily injuries in question; (iii) all the three accused were first offenders; and (iv) the prosecution was urging the court to impose a similar sentence on all the accused.

**Held (imposing lighter sentence on 2nd accused):**

**[1]** There are in this case important considerations that warrant a disparity in the sentences, namely, the adolescence of OKT2 who was 16 at the material time, and the lesser role of OKT2 who had been omnipresent but had nonetheless not participated in the actual attack on the deceased. Given those considerations, it would be hardly right to hold OKT2 as culpable as OKT1 and OKT3. (p 660 f)

**[2]** The policy of the court is that where a man pleads guilty, thereby avoiding the expense and nuisance of a trial, the court would knock something off the sentence which would have been imposed if there had not been a plea of guilty. It is also material that all the three accused had pleaded guilty even though the evidence against them for an offence under s. 302 or 304 of the Penal Code was not strong. The medical evidence was that the bodily injuries were not such as were likely to cause death and it was septicaemia that ultimately killed the deceased after he was readmitted to the hospital.

Fairly said, if not for the plea of guilty, the prosecution would not have had an easy say to prove an offence under s. 302 or 304 of the Penal Code. Given such a weak evidence, the plea of guilt is a strong mitigating factor. (pp 661 b-c & 662 c)

**[3]** The term of imprisonment in any case must reflect the seriousness of the offence. All things considered, the right and appropriate sentence is a term of imprisonment of 8 years with effect from the date of arrest in the case of OKT1 and OKT3, and a term of imprisonment of six years with effect from the date of arrest in the case of OKT2. (p 662 d-e)

*[Accused sentenced accordingly.]*

**Case(s) referred to:**
*Chia Kah Boon v. PP [1999] 4 SLR 72* ***(refd)***
*Fu Foo Tong & Ors v. PP [1995] 1 SLR 448* ***(refd)***
*Joqinder Singh v. PP [1984] 2 MLJ 133 HC* ***(refd)***
*Lee Peng Kong v. PP [1986] 2 CLJ 139; [1986] CLJ (Rep) 437 HC* ***(refd)***
*Lee Yoke Choong v. PP [1964] MLJ 138* ***(refd)***
*Low Oi Lin v. R [1949] MLJ 210* ***(refd)***
*Mohamad Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC* ***(refd)***
*Mohamed Jusoh Abdullah & Anor v. PP [1947] MLJ 130* ***(refd)***
*PP v. Jafa Daud [1981] 1 MLJ 315 HC* ***(refd)***
*PP v. Khairuddin [1982] 1 MLJ 331* ***(refd)***
*PP v. Loo Choon Fatt [1976] 2 MLJ 256 HC* ***(refd)***
*PP v. Mohd Amin Mohd Razali & Ors [2002] 5 CLJ 281 HC* ***(refd)***
*PP v. Nazaruddin Ahmad [1993] 2 MLJ 9* ***(refd)***
*PP v. Ramlee and Another Action [1998] 3 SLR 539* ***(refd)***
*PP v. Ravindran & Ors [1993] 1 MLJ 45* ***(refd)***
*R v. Kenneth John Ball 35 Cr App R 164* ***(refd)***
*R v. Murukaiyan Rasoo [1957] MLJ 26* ***(refd)***
*Reg v. WN Hammar [1958] 24 MLJ 4* ***(refd)***
*Sau Soo Kim v. PP [1975] 2 MLJ 134* ***(refd)***
*Yap Teng Chai v. PP [1959] MLJ 205* ***(refd)***

**Legislation referred to:**
Penal Code, ss. 302, 304

**Other source(s) referred to:**
*Halsbury's Laws of England*, Hailsam edn, vol 9, para 365
*Mallal's Digest*, 1997, 4th edn Revised para 2908

*For the prosecution - Ahmad Zubir Jantan, DPP*
*For the 1st accused - Wendy Ooi; M/s Ooi Sam Heng Assocs*
*For the 2nd accused - Chelvarajan R Suppiah; M/s Chelva R Suppiah & Co*
*For the 3rd accused - Sukhdev Singh; M/s Sukhdev & Assocs*

*Reported by WA Sharif*

**JUDGMENT**

**Jeffrey Tan J:**

Out of the blue, in the midst of the murder trial, the learned deputy prosecutor (Ahmad Zubir bin Jantan) tendered an alternative charge (P7), that was then read and explained to all three accused, who then pleaded guilty to the following offence:

> Bahawa kamu bersama-sama seorang lagi yang masih bebas, pada 1.11.1999 jam lebih kurang 8.00 hingga 9.05 malam di sebuah warung makan di Jalan Sisi, dalam daerah Muar, di dalam Negeri Johor Darul Takzim, dengan memajukan niat bersama telah menyebabkan kematian R. SELVAM A/L RAMAN (K/P NO: 770112-01-7239) dengan niat menyebabkan kecederaan tubuh badan yang boleh membawa kematian. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 304(a) Kanun Keseksaan.

And after the statement of facts of the case (P8) that the learned DPP presented was read and explained to them, all three accused admitted the following: (a) at about 9.00 p.m. on 1 November 1999, the complainant was informed that his brother, the deceased, was attacked by several persons, (b) the complainant found the deceased in a critical state at the district hospital, (c) meantime, the 1st accused was apprehended at the scene by two members of the public and was handed to the police, while the 2nd accused was arrested on 3 November 1999 and the 3rd accused was arrested on 23 December 2001, (d) the deceased was attacked with a knife and an axe by the 1st and 3rd accused, (e) nearby the scene was the 2nd accused who had promised the 1st and 3rd accused that he (2nd accused) would join their gang if they (1st and 3rd accused) would avenge the assault on him (2nd accused) by the deceased, (f) it was the common intention of all to cause such bodily injury as is likely to cause death, (g) the deceased died on 17 November 1999.

Pertinent to the facts of the case, the learned DPP also tendered the scabbard of a knife (P9), and an axe (P10).

Being satisfied that all three accused fully understood the nature and consequences of their plea and as well admitted without any qualification the alleged charge against them, and that the alleged offence had been disclosed, the court accepted the plea of guilt and recorded a conviction against them.

But before that, during the murder trial, a government pathologist (PW3 - Dr Shahidan bin Mohd Noor) had testified that on 18 November 1999 he conducted the post-mortem on the deceased. PW3 testified that he found multiple incised wounds on the hands, forearm, calves, thighs, and back of the accused (see pp. 19 - 20 of the notes of proceedings). Those wounds had healed to a certain extent. There were bloodstained fluids in the chest cavity. Death was caused by septicaemia. Germs had invaded the blood stream through the wounds. The deceased was discharged on 6 November 1999 but was readmitted on 8 November 1999. Those wounds would not have been sufficient to cause death in the ordinary course of nature without septicaemia. And other prosecution witnesses had tendered five photographs of the scene - P4 (1-5), 1 photograph of the said axe, and eight photographs of the deceased - P6 (1-8).

Miss Wendy Ooi for OKT1 mitigated as follows. OKT1 was a first offender who was 19 years old at the material time. When he was 11, he lost his mother, and when he was 15, his father, a fisherman, remarried. He was a mosaic worker. He was educated up to the primary school level. It was more of gang fight, as all three accused were from the same gang. It was a moment of folly. The wounds were inflicted on the limbs and not on the vital parts of the body. The intention was not to kill. The intention was to cause injury. The 1st accused held the said axe. Miss Ooi asked for a lenient sentence.

Mr Chelvarajan R Suppiah for OKT2 said that his client was a 16 years old Form 3 student at the material time. OKT2 was about to be promoted to Form 4. At the Lower School Examination, OKT2 obtained 3 As, 2 Bs, 1 C, and 1 D. He was a school prefect. His father is a sales executive in a motor company, while his mother is a housewife. He is the eldest of three siblings. The deceased had assaulted OKT2. OKT2 enlisted the help of OKT1 and OKT3. OKT2 surrendered to the police. OKT2 assisted the police. OKT2 has suffered greatly and wishes to continue with his education. Mr Chelvarajah made a similar plea for a lenient sentence.

Mr Sukhdev Singh for OKT3 said that his client was 29 years old at the material time. OKT3 was educated up to the primary school level. OKT3 was a carpenter. His income, when he had work, was about RM1,500 per month. OKT3 supported his parents. OKT3's father has lost one hand and is physically handicapped. There was no intention to kill. Mr Sukhdev asked for a second chance to be given to OKT3, and indicated that a term of imprisonment of 7 - 8 years would be fair.

The learned DPP said that it was OKT1 who accepted the "assignment". The offence was committed in a public place. It was a planned and premeditated attack. At the material time, the deceased was eating with his friends. The deceased was powerless to resist. OKT3 was the oldest and was therefore the most culpable. A deterrent sentence should be imposed to "curb" similar offences. A similar sentence should be imposed on all accused. And the learned DPP proposed a term of imprisonment of 15 years.

None said it, but " ... in deciding the appropriate sentence ... the first and foremost consideration is the public interest" (*R v. Kenneth John Ball* 35 Cr App R 164: see also *R v. Murukaiyan Rasoo* [1957] MLJ 26). The court shall pass sentence according to law. A 'sentences according to law' means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles" (*PP v. Jafa Daud* [1981] 1 MLJ 315, 316 per Mohamed Azmi J, as he then was). "The first and foremost consideration of punishment is the public interest. [Because] the object of punishment crime is ... also to deter others" (*Yap Teng Chai v. PP* [1959] MLJ 205, 206; see also *Reg v. WN Hammar* [1958] 24 MLJ 4).

In assessing sentence, all the circumstances of the offence should be considered (*Low Oi Lin v. R* [1949] MLJ 210). "The court in fixing the punishment for any particular crime, will take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he received if the crime is one of violence, the antecedents of the prisoner up to the time of the sentences, his age and character" (*Mohamed Jusoh Abdullah & Anor v. PP* [1947] MLJ 130, citing *Halsbury's Laws of England* (Hailsam edn) vol 9, para 365). "Courts are duty bound to consider all these matters before deciding upon a suitable sentence" (*Joqinder Singh v. PP* [1984] 2 MLJ 133 per Ajaib Singh J as he then was). The sentences must be one appropriate to the gravity of the offence (*Lee Yoke Choong v. PP* [1964] MLJ 138). The sentences should reflect the seriousness of the offence (*PP v. Khairuddin* [1982] 1 MLJ 331).

Mitigating factors are not to be disregarded, even if the offence calls for a deterrent sentence (*Lee Peng Kong v. PP* [1986] 2 CLJ 139; [1986] CLJ (Rep) 437. That is not to say that "the circumstances of the individual offender are more important than the protection of innocent members of the community from injury to their persons, or from risk even to their lives" (*R v. Murukaiyan Rasoo (supra)*. Public interest must not be relegated to the background. "The correct approach is to strike a balance, so far as possible, between the interest of the public and the interest of the accused" (*PP v. Loo Choon Fatt* [1976] 2 MLJ 256, 258 per Hashim Yeop A Sani J, as he then was; see also *PR v. Adam*

*Mohamad* [Mallal's Digest 4th. edn 1997 Revised para 2908) and *PP v. Mohd Nooh bin Yusof & Ors* [Mallal's Digest *ibid* para 2918]. "A court has the discretion to be lenient and merciful provided there are extenuating circumstances and it is in the public interest to do so" (*PP v. Khairuddin*).

Where 2 or more offenders are to be sentenced for the participation in the same offence, "the sentence to be passed on them should be the same, unless there is a relevant difference in their responsibility for the offence or their personal circumstances" (Archbold 1993, and quoted in *PP v. Nazaruddin Ahmad* [1993] 2 MLJ 9). " ... the general rule is that any unjust disparity should be avoided. However, there is nothing to prevent the court from imposing a range of sentences on the accused persons if there are important considerations for so doing. "A difference in the sentences imposed on co-defendants may be justified by their different roles in the offence ... " (Archbold 2002 para 5-170). The ages of the accused, the degrees of culpability and the differences in mitigation are amongst some of the important factors which warrant a disparity in sentences" (*PP v. Ravindran & Ors* [1993] 1 MLJ 45, and quoted in *PP v. Mohd Amin bin Mohd Razali & Ors)* [2002] 5 CLJ 281). A first offender may be given a lighter sentence (*Fu Foo Tong & Ors v. PP* [1995] 1 SLR 448), but a serious disparity of sentences should be avoided (*PP v. Ramlee and Another Action* [1998] 3 SLR 539).

In the instant case, there was a call to impose a similar sentence on all 3 accused. But there are important considerations that warrant a disparity in the sentences, namely, the adolescence of OKT2 who was 16 at the material time, and the lesser role of OKT2 who had been omnipresent but had nonetheless not participated in the actual attack on the deceased. Given those considerations, it would hardly be right to hold OKT2 as culpable as OKT1 and OKT3. There was a difference in the degree of culpability, a fact that the learned DPP recognised and admitted as much when he said that OKT3 was the most culpable. There ought to be a disparity in the sentences, and with OKT2 to be given the lower end of the range of sentences.

What would be the appropriate range of sentences? All three accused are first offenders, but given the seriousness of the offence that would count for little. All three accused pleaded guilty to the offence. Now that is a fact most material, for "Whether a person is a hardened criminal or not, ... a plea of guilty should be treated as a mitigating factor. It not only saves the country a great expense of lengthy trial but also saves time and inconvenience of many, particularly the witnesses" (*Sau Soo Kim v. PP* [1975] 2 MLJ 134, 137, per Lee Hun Hoe CJ Borneo). As observed by Visu Sinnadurai J in the oft-quoted

case of *PP v. Ravindran* [1993] 1 MLJ 45, 51, "It is an accepted rule of practice that an accused person should be given credit or discount for pleading guilty. The rationale for this rule is that much public time and money will be spared if an accused admits his guilt, thus avoiding a prolonged and unnecessary trial". And as further observed by Visu Sinnadurai J, "The general rule that an accused person who pleads guilty is entitled to a discount was applied by our Supreme Court in *Mohamad Abdullah Ang Swee Kang v. PP*. The Supreme Court adopted with approval the views expressed by Cummings-Bruce LJ in *R v. Boyd* where he said: The policy of the court is that where a man does plead guilt, which does give rise to public advantage and avoids the expense and nuisance of a trial, which may sometimes be a long one, the court encourages pleas of guilty by knocking something off the sentence which would have been imposed if there had not been a plea of guilty".

In *Mohamad Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 Mohamed Azmi SCJ imparted the following guide:

> In assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering, firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence of absence of mitigating factors, and fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any. The fact that a sentence of imprisonment is imposed as a deterrence does not justify the sentencer in passing a sentence of greater length than what the facts of the offence warrant. The gravity of the type of offence involved must be considered in the light of the particular facts of the offence. As stated by James LJ in *R v. Ladd & Tristam*:
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> > We have to look at the overall picture of what is the right sentence for the total involvement, the total degree of criminality involved, and we have to keep the sentences in perspective with the sentences that have been passed on other occasions for offences involving criminal activity of this kind, though of course varying in their gravity. Clearly a deterrent element has to be involved, but because the offences are very serious, it does not necessarily follow that on the particular facts very long sentences are justified
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> A sentencer must give sufficient discount for all extenuating circumstances pertaining to the degree of culpability or criminality involved, which must necessarily vary from case to case apart from other mitigating factors. Unless there is a proper reason for withholding such credits, failure to do so may result in the sentencer not exercising his or her discretion judicially in assessing the level of custodial sentence. In *R v. Meade*, a young man who pleaded guilty to arson was granted a reduction in his sentence of six years' imprisonment in what would otherwise have been the proper sentence for such a serious offence. In the course of his judgment, Lord Lane CJ said:

> A term of five to six years, whatever the age of the offender may be, is in many cases of using a petrol bomb a perfectly appropriate sentence, because these weapons are rightly called bombs. They can cause the most fearful injuries and this case demonstrates the sort of damage they can cause to property. But having said that, the help that he gave to the police and his plea of guilty earn him a discount.

It is also material that all three accused pleaded guilty, even though the evidence against them for an offence under s. 302 or 304 of the Penal Code was not strong. The medical evidence was that the bodily injuries were not such as were likely to cause death. As a matter of fact, the deceased was discharged from the hospital. The medical evidence was that it was septiceamia that ultimately killed the deceased after he was readmitted. Fairly said, if not for the plea of guilty, the prosecution would not have had an easy say to prove an offence under s. 302 or 304 of the Penal Code. Given the weak evidence of an offence under s. 302 or 304 of the Penal Code, the plea of guilt is a strong mitigating factor (see *Chia Kah Boon v. PP* [1999] 4 SLR 72). That is not to say however that the accused had not therefore committed a most serious offence. A life was lost. The accused could not be let off with a lenient sentence. Imprisonment is the only option. The term of imprisonment must reflect the seriousness of the offence. And when all things are considered, the right and appropriate sentence is a term of imprisonment of eight years with effect from the date of arrest in the case of OKT1 and OKT3, and a term of imprisonment of six years with effect from the date of arrest in the case of OKT2.